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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1930. No. 720.

WALTER C. FETTERS, United States Marshal for the Eastern District of Pennsylvania,
Petitioner,

vs.

THE UNITED STATES OF AMERICA EX REL. THOMAS W. CUNNINGHAM,
Respondent.

Brief for Respondent on a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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WALTER C. FETTERS, United States Marshal for the Eastern District of Pennsylvania,

Petitioner,

vs.

THE UNITED STATES OF AMERICA EX REL. THOMAS W. CUNNINGHAM,

Respondent.

BRIEF FOR RESPONDENT ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

SUPPLEMENTAL STATEMENT.

Petitioner's statement, page 4, should be supplemented by the essential facts stated in the opinion filed by Buffington, C. J., in the Circuit Court of Appeals in the former habeas corpus proceeding, which was made a part of the return in the instant proceeding (Petitioner's Brief, p. 5); since as concluded by Judge Dickinson in the District Court (R. 104), that opinion determines the law of the case and made necessary respondent's discharge, which by him was ordered (R. 107). That opinion states (33 F (2d) 261):

"On May 18, 1926, a primary election was held in Pennsylvania and William S. Vare received the Republican nomination as a candidate for the United States Senate. At the general election held on November 2, 1926, he was elected United States Senator. Thereafter a petition was presented to the Senate contesting his election on the ground that fraudulent and unlawful practices were used in connection therewith.

On May 19, 1926, the Senate of the United States by resolution 195 created a committee of five members and authorized and instructed it,

'To investigate what moneys, emoluments, rewards, or things of value, including agreements or understandings of support for appointment or election to office have been promised, contributed, made or expended, or shall hereafter be promised, contributed, expended or made by any person, firm, corporation, or committee, organization, or association, to influence the nomination of any person as a candidate of any political party or organization for membership in the United States Senate or to contribute to or promote the election of any person as a member of the United States Senate at the general election to be held in November, 1926. Said committee shall report the names of the persons, firms, or corporations, or committees, organizations, or associations that have made or shall, hereafter make such promises, subscriptions, advancements, or payments and the amount by them severally contributed or promised as aforesaid; including the method of expenditure of said sums or the method of performance of said agreements, together with all facts in relation thereto * * *

'The chairman of the committee or any member thereof may administer oaths to witnesses. Every person who, having been summoned as a witness by authority of said committee wilfully makes default, or

who, having appeared, refused to answer any question pertinent to the investigation heretofore authorized, shall be held to the penalties provided by Section 102 of the Revised Statutes of the United States.

'Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refused to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months.

Pursuant to the resolution, the committee held a meeting at Washington in the District of Columbia, on February 21, 1927, at which the relator appeared in obedience to a summons of the committee but refused to answer certain questions asked by the committee on the ground that they related to his personal business and were not pertinent to the investigation authorized by the Senate.

The relator was thereafter on April 20, 1928, indicted by a grand jury in the Supreme Court of the District of Columbia, for refusing to answer the questions, which related to his contribution of $50,000 to Mr. Thomas F. Watson, chairman of the City Committee of Philadelphia, for use in the Primary election, in which William S. Vare was nominated.''

The indictment contains six counts. The questions and answers follow:

FIRST COUNT.

"Mr. Cunningham: I handed money to Thomas F. Watson $25,000 on the 10th day of April, 1926.

The Chairman: Where did you get that money?

Mr. Cunningham: I got that money out of my own private funds.

The Chairman: How is that?

Mr. Cunningham: Out of my own private funds.

The Chairman: Your own private moneys?

Mr. Cunningham: Yes, sir, my own money, my own money.

The Chairman: How long had it been your own money?

Mr. Golder at that time stated an objection, which appears in the record.

The question was repeated as follows (reading):

The Chairman: How long had it been your own money?

Mr. Cunningham: I refuse to answer that question, Senator, as a personal question. It is my own private business."

SECOND COUNT.

"The Chairman. Where did you get this $25,000 you say you gave to Mr. Watson?

Mr. Cunningham: I refuse to answer that question, I think that is personal."

THIRD COUNT.

"The Chairman: Where were you keeping the $25,000 before you gave it to Mr. Watson?

Mr. Cunningham: That is another personal question, Senator. I refuse to answer it."

FOURTH COUNT.

"The Chairman: Did you have it in your pocket when you gave it to him—before you gave it to him?

Mr. Cunningham: Yes, sir.

Mr. Chairman: Where did you get it from to put in your pocket?

Mr. Cunningham: That is a personal question, and I decline to answer it.

FIFTH COUNT.

"The Chairman: Mr. Cunningham, how long had you had this money in your possession?

Mr. Cunningham: That is another personal question, and I decline to answer it. It was my own money, and I do not think I should tell the public where I kept it and how I got it, or anything else about it."

SIXTH COUNT.

"The Chairman: Was this money which you refer to as the $25,000 that you gave to Watson, savings from your salary?

Mr. Cunningham: That is another personal question. I cannot answer that."

On an affidavit of S. Busha, a warrant was issued and the relator was arrested and brought before Judge Dickinson who appears to have sat in three proceedings: 1. Committing magistrate, 2. Motion for warrant of removal, and 3. Hearing upon writ of habeas corpus.

As above stated, the writ of habeas corpus was dismissed, the warrant for removal was allowed and the relator was remanded to the custody of the United States Marshal for removal to the District of Columbia.

An appeal was taken and the question before us is

whether or not probable cause of the relator's guilt is sufficient to justify his removal for trial."

The Circuit Court of Appeals in an opinion by Buffington, C. J., with Davis, C. J., concurring and Woolley, C. J., dissenting, reversed Judge Dickinson's judgment on the ground that "prima facie evidence of probable cause which the indictment established is overcome by its own terms in failing to charge a crime," because the questions propounded were not pertinent (33 F (2d) 261).

After the decision of the Supreme Court of the United States in Barry vs. Cunningham (1929) 279 U. S. 597, a petition for reargument was filed, which averred that the decision of the Circuit Court of Appeals was at variance with the holdings of this Court in that case and the cases following:

Rodman vs. Pothier (1923), 264 U. S. 399;
Morse vs. United States (1924), 267 U. S. 83, and
Henry vs. Henkel (1914), 235 U. S. 219.

On rehearing, the Circuit Court of Appeals, in its opinion which is printed at the end of this book, marked Appendix "A", said:

"We adhere to our previous opinion, and in doing so, we do not, in our view, disregard the holdings of the Supreme Court." The final judgment was then entered "with instructions to discharge the relator."

Petition for writ of certiorari and suggestion of abatement, because of failure to substitute, within the statutory period, the successor of the marshal who had gone out of office, were filed in this court; which on October 27th, 1930, granted the writ, vacated the judgments of the courts below and remanded the cause to the District Court with directions to dismiss the proceedings as abated. Mathues vs. United States Ex rel. Cunningham (1930), 282 U. S. 123.

Respondent surrendered himself to Fetters, the United States Marshal in office, filed his new petition for writ of habeas corpus (R. 3-6) to which a return was filed (R. 32-35) and traversed (R. 102-3).

It was stipulated by counsel that "the hearing * * * shall be determined upon the petition, the writ, the return * * * and traverse to the return, including the former habeas corpus proceeding" (R. 103).

Judge Dickinson concluded that "the law of the case * * * is what the Circuit Court of Appeals has declared it to be" U. S. ex rel. Cunningham vs. Mathues, 33 (2d) F. R. 261, on December 23rd, 1930, entered an order discharging the respondent (R. 107).

On the same date an appeal to the Circuit Court of Appeals (R. 109) was allowed and docketed as of March Term, 1931, No. 4543, with no further proceedings taken except the filing of the transcript of record.

On February 10th, 1931, a petition for certiorari was filed in this Court and its prayer granted on March 2nd, 1931.

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

REMOVAL PROCEEDINGS—PROBABLE CAUSE—INDICTMENT PRIMA FACIE, NOT CONCLUSIVE—JURISDICTION OF REMANDING COURT—PERTINENCY.

(1)

On writ of habeas corpus in removal proceedings may the remanding court consider the indictment as prima facie but not conclusive evidence of the existence of a crime in its determination of probable cause, or has the court of trial exclusive jurisdiction to determine the existence of a crime.

(2)

Where all the proofs constituting the crime charged are contained in the indictment, may the prima facie evidence of probable cause established by the indictment be overcome by its own counts if without doubt they do not charge a crime.

(3)

Are the questions propounded, which respondent's refusal to answer constitutes the crime charged under Section 102 R. S. (U. S. C. Title 2, Sec. 192), "pertinent" to the investigation authorized by Senate Resolution 195 of the 69th Congress.

ARGUMENT.

Section 1014 of the Revised Statutes (U. S. C. Title 18, Sec. 591) makes the fact of probable cause of (1) the existence of a crime and (2) the guilt and (3) identity of the accused, the inquiry in removal proceedings.

The existence of a crime or the guilt of the accused prima facie may be established at the hearing of a petition for habeas corpus by introducing in evidence the indictment or by other proofs without the production of the indictment.

Distinction Between Indictment As A Pleading And As a Fact Evidential Of Probable Cause.

The distinction is clear between an indictment as a pleading in a criminal case and as a fact evidential of probable cause under a habeas corpus in removal proceedings.

The thread of differentiation announced by this court in Pierce vs. Creecy (1907), 210 U. S. 397, and repeated and applied in Rodman vs. Pothier (1923), 264 U. S. 399; Henry vs. Henkel (1914), 235 U. S. 219, and Morse vs.

United States (1924), 267 U. S. 83, and which runs through all the reported cases considered by either the District Courts or the Circuit Courts of Appeal of the United States is that in removal proceedings the court of asylum will not pass upon the sufficiency of the indictment as a formal pleading, but may consider the indictment as a fact with other facts in the proofs as evidential of the existence of a crime in its determination of the controlling inquiry of probable cause. The reason for this is evident, for unless the trial court is given plenary jurisdiction to determine the sufficiency of its pleadings, e. g. the indictment, the writ of habeas corpus could be made the substitute for a writ of error; and unless the remanding court may weigh the offense as charged in the indictment with all the other proofs, all the facts evidential of probable cause, or its lack, will not have been considered, and the most essential or persuasive consideration in reaching a conclusion will have been ignored, viz., *the existence of a crime.*

The Government's argument is based on the erroneous assumption that respondent attacks the sufficiency of the indictment as a pleading (pp. 7-13 Petitioner's brief).

In the instant proceedings the sufficiency of the indictment is not challenged as a formal pleading, but is attacked as a fact in the proofs evidential of the existence of a crime in the determination of the controlling inquiry of probable cause and this because its counts do not show the existence of a crime.

Petitioner's Error.

It is the confounding of the indictment as a formal pleading with its use of a fact in the proofs which leads petitioner to the erroneous contention that since the indictment sets forth the questions of disputed pertinency and alleges them to be "pertinent", the indictment is conclusive of probable cause and gives to the trial court exclusive and sole jurisdiction for the determination of that fact.

Conclusion of Circuit Court of Appeals.

The Circuit Court of Appeals, following the distinction as announced and repeatedly applied by this court held the indictment was not conclusive but prima facie evidence only of probable cause, concluded "that the prima facie evidence * * * which the indictment established is overcome by its own terms in failing to charge a crime" because the propounded questions are not pertinent, and ordered the discharge of the respondent.

It is then petitioner's contention that the remanding court is without jurisdiction to decide that no crime exists even though it is patent and without doubt that the indictment fails to disclose the existence of a crime, the accused must be held in custody and remanded to the trial court for judicial determination of this evident conclusion of law.

It is submitted that this is oppressive administration of criminal law without reason, which this court has always condemned. The contention (1) fails to observe the purpose of the hearing which Section 1014 of the U. S. Revised Statutes gives the accused and emasculates the statute since it says trial court must decide existence of crime though there is doubt neither as to statutory definition of crime nor acts alleged, (2) ignores the distinction between prima facie and conclusive use of the indictment as proof of probable cause, (3) disregards the necessity of finding probable cause, (4) ignores the existence of a crime as the most essential element in the finding of probable cause and (5) disregards the legal conclusions of this court that the question of pertinency is one of law and that the burden of proving pertinency is on petitioner.

Respondent's argument against petitioner's contention and in support of the conclusion and final order of the court below, may be stated and will be developed in the order following:

(1) The indictment is prima facie but not conclusive evidence of probable cause of either the existence of a crime or guilt of the accused.

(2) The indictment as prima facie evidence of probable cause may be overcome by its own terms because not charging a crime.

(3) The indictment does not charge a crime because the questions propounded as set forth in its counts are not "pertinent" to the investigation authorized by the Senate.

I.

THE INDICTMENT IS PRIMA FACIE BUT NOT CONCLUSIVE EVIDENCE OF PROBABLE CAUSE OF EITHER THE EXISTENCE OF A CRIME OR GUILT OF THE ACCUSED.

Few Circuit Courts of Appeal of the United States have so frequently and recently examined the law relating to probable cause in removal proceedings, as the three judges who decided this case.

In United States v. Glass (1928), 25 Fed. (2nd) 941, Judge Woolley writing the opinion of the Court, with the same members sitting, said:

> "The law on removal was correctly stated by the learned trial Judge and was recently reviewed by this Court in United States vs. Mathues, 19 Fed. (2d.) 22, and Swan v. United States, 23 Fed. (2d.) 148 with extended citation of supporting authorities."

He then stated that in the decision of that case he would "pursue the discussion solely on the law which we have before stated as follows:"

> "The indictment is introduced in proceedings under Section 1014, R. S. (18 USCA, Sec. 591), 'not to es-

tablish the appellant's guilt, but only as evidence to show that there was cause to believe his guilt probable enough to justify his removal for trial."

"The indictment is itself evidence that there was probable cause for finding it. Of this, however, the indictment is not conclusive * * * its evidential effect is only prima facie."

"Hence the accused may attack it as not charging a crime and therefore as not showing probable cause."

The above propositions were stated on the authority of Pierce v. Creecy (1907), 210 U. S. 387, and Morse v. United States (1924), 267 U. S. 81.

In Swan vs. United States (1928), 23 Fed. (2d.) 148, Judge Woolley points out the distinction above adverted to, in the language following:

"The requisite probable cause in removal cases may be proved by the indictment as evidence, or by other evidence without the production of the indictment, or, indeed, in advance of the indictment. * * * *When it is sought to be proved by the indictment, the instrument is prima facie evidence which may be overcome by its own terms when they fail to set forth a crime.* Yet no matter how inartificially it may be drafted, the Commissioner or Judge at a removal hearing has authority to pass upon its effect only in respect to its proof of probable cause. * * * He has no authority to determine the validity of the indictment when offered only as evidence. That is the function of the trial Court."

This Court in effect affirmed the distinction made by Judge Woolley in the above case when it refused to grant a petition of certiorari in Swan v. United States (1928), 277 U. S. 597.

In *Pierce v. Creecy, supra*, the distinction between the two methods of attack or uses of the indictment in removal proceedings, is said "though narrow, is clear," by Mr. Justice Moody, then speaking for this Court:

> "The counsel for the petitioner disclaim the purpose of attacking the indictment as a criminal pleading, appreciating correctly that the point here is not whether the indictment is good enough, over reasonable challenge, to bring the accused to the bar for trial. *Counsel concede that they cannot successfully attack the indictment except by showing that it does not charge a crime. The distinction between these two kinds of attack, though narrow, is clear.*"

He then points out that the one and primary inquiry is not the sufficiency of the indictment as a pleading, but, on the contrary, whether the acts set forth in the indictment charge a crime, saying:

> "Before proceeding further, it is well to set forth all the objections to the indictment made by counsel, in order to see whether, if any one of them is well founded, it shows that there was no charge of crime against the petitioner. For if all criticisms of the indictment should be approved, and they leave untouched in the pleading enough to show that the petitioner was charged with crime in the broad and practical sense in which those words ought to be understood, the condition prescribed by the Constitution has been performed."

After considering the separate exceptions, and pointing out that they all present "a mixed question of law and fact," he concludes that:

> "All the other objections are appropriate to a demurrer or a motion to quash or in arrest of judgment.

They are attacks upon the indictment as a criminal pleading."

The sentence following is particularly applicable to the instant case, for he finds that:

> "The indictment, whether good or bad, as a pleading, *unmistakably describes every element of the crime of false swearing.*"

In Morse vs. United States (1924), 267 U. S. 81, the essential facts are stated as follows:

> "Appellants, under indictment in the District of Columbia, while passing through New York on February 6, 1923, on their way to Washington for trial, were arrested and taken from the train by a United States Marshal upon bench warrants issued on Federal indictments found in New York, charging them with fraudulent uses of the mails. Previously, their removal to New York from Connecticut and Massachusetts, respectively, for trial under these indictments, had been sought under Sec. 1014, Rev. Stat. (Com. Stat., Sec. 1674, 2 Fed. Stat. Anno. 2d. ed., p. 654). The removal of Harry F. Morse from Connecticut had been granted by the Commissioner, but, upon *habeas corpus* proceedings, he had been discharged from custody by the Connecticut Federal District Court for want of probable cause, principally on the ground that the New York indictment was insufficient to charge a criminal offense (287 Fed. 907), although the New York court had previously held it good."

After a hearing at which the indictments were offered in evidence, together with other proofs, the writs were dismissed and Mr. Justice Sutherland states the second reason in support of error, in the following language:

"It is urged that the decision of the Federal District Court in Connecticut, discharging Harry F. Morse, was *res adjudicata* and conclusively determined (1) that the New York bench warrant was *illegally issued*, and, therefore, could not be made the basis for the subsequent arrest in New York; and (2) *that the indictment was fatally defective.*"

This Court's answer to the second contention makes clear the distinction, for the learned Justice points out that it

"Proceeds upon a complete misconception of the purpose for which the indictment is produced and considered in removal proceedings, and the authoritative effect of the ruling of the Commissioner and the Court on *habeas corpus* in receipt thereof. The inquiry in such proceedings is whether there is probable cause to believe the prisoner guilty and justify his removal for trial."

He then says:

"The indictment was before the Commissioner simply as evidence for the purpose of establishing or *tending to establish the commission of an offense;* and the Commissioner had authority to pass upon its effect *in that aspect only.*"

He then concludes that neither the Commissioner nor the Court *"had authority to determine the sufficiency of the indictment as a pleading,"* and quotes the following excerpt from Mr. Justice Moody, in *Pierce v. Creecy* (1907), supra:

"The only safe rule is to abandon entirely the standard to which the indictment must conform, judged as a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has

been, in fact, however inartificially, charged with crime in the State from which he has fled."

In short, in *Morse v. United States, supra,* it was contended (a) that the discharge of an accused in removal proceedings for want of probable cause, was conclusive of his guilt, and (b) that the indictment was insufficient as a criminal pleading, to sustain the charge of crime; and this Court denied both contentions, closing its opinion in the language following:

> "In other words, the Commissioner, or the Court, in review on *habeas corpus,* for lack of power cannot *conclusively adjudge the indictment, qua indictment, to be either good or bad, or pass finally upon the guilt or innocence of the accused."*

Henry v. Henkel (1914), 235 U. S. 219, does not modify either the law or practice as uniformly announced and applied by this Court. Mr. Justice Lamar, however, in the Henry case, emphasizes the fact that *where under all the proofs a doubt exists* as to whether the acts charged in the indictment or proved at the hearing disclose a crime, the removal Court should refuse the writ and remand the issue to the decision of the trial court.

The facts of *Henry v. Henkel* and of the instant case, are similar in so far as the indictment grew out of the refusal to answer questions before a legislative body. They differ, however in essential particulars. The Henry case suggested that the questions asked were neither relevant nor proper, and stressed the unconstitutionality of the Act which required the giving of information which was dishonorable for the witness to disclose. Counsel in that case urged that the unconstitutionality of the statute was so clear as to warrant the removal Court in so deciding as a matter of jurisdiction. This Court was of different opinion,

and *expressing doubt as to its constitutionality*, remanded the issue to the trial Court for final decision.

That case did not decide the issue raised in the instant petition, namely, should the removal Court decide as matter of law, that no crime is charged where the acts alleged in the indictment or proved at the hearing, clearly and without doubt, negative as matter both of fact and law, the existence of the crime charged.

Mr. Justice Lamar, on page 225, after referring to the fact that the scope of inquiry under the resolution of the House of Representatives was "the activities of national banks * * * and groups of financiers," says:

> "That the witness 'was asked to give the names of those composing the New York syndicate but claimed to have the right under the Constitution to decline to answer the question, saying, also, that he "did not want to disclose the names of the participants in the New York syndicate, although he understood it to be the wish of the subcommittee that he should, for the reason that he would consider it dishonorable to reveal the names of his customers unless compelled to do so." ' "

He then states, on page 227, that the defendant argued that, "in view of the provisions of the 4th Amendment to the Constitution, neither House can compel a citizen to disclose his private affairs as a basis for legislation."

> "They therefore contend that the papers show on their face that there was no jurisdiction to issue the warrant on which he was held, and that Henry should not be subjected to the hardship of being removed to the District of Columbia to stand trial upon an indictment which affirmatively shows that no crime has been committed."

He then discusses the law, and concludes that the facts of the Henry case are not within the rule announced in the cases relied upon by the petitioner, saying, on page 229:

> "Manifestly, this is true as to *disputed* questions of fact, and it is equally so as to *disputed* matters of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. These and all other *controverted* matters of law, and fact are for the determination of the trial Court."

He then reviews the cases in support of his conclusion, but is careful to add the principle, in language which is particularly applicable to the instant case, saying, on page 230:

> "The cases cited do not, of course, lead to the conclusion that a citizen can be held in custody or removed for trial where there was no provision of the common law or statute *making an offense of the acts charged.* In such case the committing Court would have no jurisdiction, the prisoner would be in custody without warrant of law, and therefore entitled to his discharge. Greene v. Henkel, 193 U. S. 261, 46 L. ed. 189, 22 Sup. Ct. Rep. 218."

In the succeeding sentence, he then sets forth the rule that a statute should, by the removal Court, be declared unconstitutional only "when plainly and palpably void."

It will then be observed that the Henry case recognizes the practice and announces the rule herein contended for by respondent, who suggests the only inquiry in this case is whether the proofs of the instant proceedings so clearly disclose that the acts charged in the indictment and proved at the trial, do not constitute any crime as to jus-

tify the removal Court in so deciding as matter of undisputed law or fact.

Benson v. Henkel (1904), 198 U. S., p. 11, is also an authority in accord wtih Pierce v. Creecy, supra, and Morse v. U. S., supra. After stating the general rule on page 10, "That the legal sufficiency of the indictment is only to be determined by the Court in which it is found," Mr. Justice Brown says:

> "Of course this rule has its limitations. If the indictment were a mere information, *or obviously, upon inspection, set forth no crime against the United States,* or a wholly different crime from that alleged as the basis for proceedings, or if such crime be charged to have been committed in another district from that to which the extradiction is sought, the Commissioner could not properly consider it as ground for removal. In such cases resort must be had to other evidence of probable cause."

On the necessity of the indictment setting forth such acts as will charge a crime, the learned Justice says:

> "While the principle laid down in some of the earlier cases in this Court, that an indictment upon a statute is ordinarily sufficient if framed in the language of the statutes has been somewhat qualified in later cases, the rule still holds good that where the statute contains every element of the offense, and an indictment is offered in evidence before the extradition Commission as proof of probable cause, it is sufficient if framed in the language of the statute with the ordinary averments of time and place, *and with such a description of the fraud, if that be the basis of the indictment, as will apprise an intelligent man of the nature of the accusation,* notwithstanding that such indictment may be open to motion to quash or

motion in arrest of judgment in the court in which it was originally found. An extradition Commissioner is not presumed to be acquainted with the niceties of criminal pleading. His functions are practically the same as those of an examining magistrate in an ordinary criminal case, and if the complaint upon which he acts *or the indictment offered in support thereof contains the necessary elements of the offense*, it is sufficient, although a more critical examination may show that the statute does not completely cover the case."

Rodman vs. Pothier (1923), 264 U. S. 399, does not question, but on the contrary distinctly announces the law as stated and applied by the Court below. The question involved in the Rodman-Pothier case was whether or not the prima facie of probable cause established by the indictment was overcome by the other facts introduced by the relator. This question depended on whether or not the alleged crime was within the exclusive jurisdiction of the United States, and this in turn on the question whether the United States had acquired title to the land embraced within a certain reservation. The District Court was of opinion that, p. 402:

"The defendant has failed to overcome the prima facie case made by the indictment and that the evidence fails to show the want of probable cause."

Mr. Justice McReynolds then points out, p. 402 that:

"The Circuit Court of Appeals (291 Fed. 311) was 'of the opinion that no other conclusion can be drawn from the evidence than that, at the time the crime charged in the indictment was committed, the United States had acquired no title in the land embraced within Camp Lewis Military Reservation.'

> * * * This being so there is an absolute want of probable cause for the removal of the appellant to answer to the crime charged."

He then gives this Court's conclusion to the contrary, because the principal question of exclusive jurisdiction and collateral question of title to the land involved "*consideration of many facts and seriously controverted questions of law,*" saying on page 402:

> "We think there was enough to show probable cause, and that the judgment of the district court is correct. Whether the locus of the alleged crime was within the exclusive jurisdiction of the United States demands consideration of many facts and seriously controverted questions of law. As heretofore often pointed out, these matters must be determined by the court where the indictment was found."

At the bottom of page 402, the opinion closes with the statement: that it is because of the presence of disputed questions of facts and controverted matters of law, that these questions were remanded to the trial court.

> "Manifestly, this is true as to disputed questions of fact, and it is equally so as to disputed matters of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. These and all other controverted matters of law and fact are for the determination of the trial court."

The following late case decided by the U. S. Circuit Court of Appeals for Second Circuit, is called to the attention of this Court as in accord with the law as by it announced and applied:

United States ex rel. Brody v. Hecht (1926), 11 Fed. Rep. 2nd Ser. 128, wherein the habeas corpus was sustained on the ground that the indictment and other facts in evidence not being in dispute clearly established that no crime was charged in the indictment.

Circuit Judge Rodgers tersely states the rule as follows, p. 134:

> "It must also be admitted that in removal proceeding, in which there are disputed questions of fact or disputed matters of law, such controverted matters of law or fact must be left for the determination of the court where the indictment was found, and cannot be decided by the court in which the removal proceeding is heard. * * * *It is, however, an entirely different matter where in such a proceeding there are no disputed questions of fact or of law, and it clearly appears that the offense charged in the indictment was not committed in the district in which the indictment was found.*"

II.

THE INDICTMENT AS PRIMA FACIE EVIDENCE OF PROBABLE CAUSE MAY BE OVERCOME BY ITS OWN TERMS BECAUSE NOT CHARGING A CRIME.

It was on the authority of Tinsley v. Treat (1906), 205 U. S. 20, that His Honor, Judge Woolley, reached the conclusion in U. S. ex rel. Haim v. Mathues (1927), 19 Fed. Reporter (2d) 22, that the accused may attack the indictment as not charging a crime, and in Swan v. United States, supra, that when probable cause "is sought to be proved by the indictment, the instrument is prima facie evidence which may be overcome by its own terms when they fail to set forth a crime."

In U. S. ex rel. Tassell vs. Mathues (1926), 11 Fed. R. (2nd), 53, Judge Davis says:

"If the indictment clearly fails to charge a crime, it is bad, and a defendant should not be removed to a district to answer the crime with which he has not been charged."

In *Tinsley v. Treat* (1906), 205 U. S. 20, in an opinion by Mr. Chief Justice Fuller, this Court said:

"It was held in Beavers v. Henkel, 194 U. S. 73; Benson v. Henkel, 198 U. S. 1; Hyde v. Shrime, 199 U. S. 62, as well as Greene v. Henkel, supra, that an indictment constituted prima facie evidence of probable cause, but not that it was conclusive.

We regard that question as specifically presented in the present case and we hold that the indictment cannot be treated as conclusive under Section 1014.

This being so, we are of opinion that the evidence offered should have been admitted. It is contended that that evidence was immaterial, and, if admitted, could not have affected the decision of either the District or Circuit Judge. Of course if the indictment were conclusive, any evidence might be said to be immaterial, but if the indictment were only prima facie, then evidence tending to show that no offense triable in the Middle District of Tennessee had been committed by defendant in that district could not be regarded as immaterial.

The Constitution provides that 'The trial of all crimes, except in cases of impeachment, shall be by jury and such trial shall be held in the State where the said crime shall have been committed' (Article III, Section 2); and that 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed' (Amended VI); and in order that any one accused

shall not be deprived of this constitutional right, the Judge applied to to remove him from his domicile to a district in another State must find that there is probable cause for believing him to have committed the alleged offense and in such other district. And in doing this his decision does not determine the question of guilt any more than his view that the indictment is enough for the purpose of removal definitely determines its validity.

Appellant was entitled to the judgment of the District Judge as to the existence of probable cause on the evidence that might have been adduced, and even if the District Judge had thereupon determined that probable cause existed, and, such a determination could not be revised on habeas corpus, it is nevertheless true that we have no such decision here, and the order of removal cannot be sustained in its absence. Nor can the exclusion of the evidence offered be treated as mere error, inasmuch as the ruling involved the denial of a right secured by statute under the Constitution.

This conclusion is fatal to the order and warrant of removal and requires a resersal of the judgment below and the discharge of appellant."

In Morse vs. United States, *supra*, Mr. Justice Sutherland stated that the indictment was before the commissioner as evidence only for the purpose of establishing or tending to establish the commission of a crime.

In *Pierce v. Crecy, supra*, Mr. Justice Moody points out that in that case,

"The only condition which it is insisted is absent is the charge of a crime. The only evidence of a charge of crime is the indictment, *and the contention to be examined is that the indictment is insufficient proof that a charge has been made.*"

He then points out the distinction between attacking the indictment as a criminal pleading, and as a fact in the proofs evidential of probable cause, saying that

> "Counsel conceded that they cannot successfully attack the indictment except by showing that it does not charge a crime."

In *Henry v. Henkel,* supra, Mr. Justice Lamar concedes the right of an accused to attack the indictment as not charging a crime, in the following language:

> "The cases cited do not, of course, lead to the conclusion that a citizen can be held in custody or removed for trial where there was no provision of the common law or statute *making an offense of the acts charged.* In such cases the committing Court would have no jurisdiction, the prisoner would be in custody without warrant of law, and therefore entitled to his discharge. Green v. Henkel, 183 U. S. 261, 46 L. ed. 189, 22 Sup. Ct. Rep. 218."

Beavers v. Henkel (1903), 194 U. S. 76, cites the case *Green v. Henkel,* 183 U. S. 249, and recognizes the practice permitted both before the Commissioner and the removal Court on *habeas corpus* of the accused's rights to introduce evidence on the question of probable cause in rebuttal of the *prima facie* proof of the indictment.

In Greene v. Henkel (1901), 183 U. S. 261, the accused was permitted to attack the indictment as not charging a crime, but this court held on other evidence being introduced that probable cause was shown.

Every case referred to by petitioner with the exception of Hyde v. Shine (1904), 199 U. S. 62; Horner vs. United States (1891), 143 U. S. 570; and Hughes v. Gault (1925), 271 U. S. 142, herein has been analyzed; and it is submitted none of the cases sustain his contention, but are

authorities for the proposition that the remanding court may discharge the accused if the indictment does not charge a crime or all the evidence does not show probable cause that a crime exists.

Hyde vs. Shine, supra, is in accord with the law as stated by the Circuit Court of Appeals on the authority of Pierce vs. Creecy, supra; Rodman vs. Pothier, supra and Morse vs. United States, supra. Mr. Justice Brown on page 84 says:

> "In the Federal courts, however, it is well settled that upon habeas corpus the court will not weigh the evidence, *although if there is an entire lack of evidence to support the accusation the court may order his discharge.* In this case, however, the production of the indictment made at least a prima facie case against the accused, and if the commissioner received evidence on his behalf it was for him to say whether upon the whole testimony there was proof of probable cause."

The dissenting opinion by Mr. Justice Peckham concured in by Justices White and McKenna, says, page 86:

> "The indictment constitutes prima facie evidence of probable cause, but evidence may be given to rebut it."

The learned Justice further says on page 87:

> "The right is none the less, when the want of probable cause rests upon conclusive evidence of the absence of the defendants from the district at the time when the indictment alleges the conspiracy was formed in such district. If defendants were not then there, they could not be guilty of the crime charged in the indictment."

The dissenting opinion closes with the following sentence:

> *"The enforcement of the criminal law should not be made oppressive in such cases, and, therefore, when it appears there was no probable cause to found the indictment upon, the order of removal should be refused."*

In Horner vs. United States, supra, the accused was not arrested on a warrant after indictment found, but was arrested on complaint on oath of a post office inspector before a United States commissioner. On habeas corpus it was contended that the circular set forth in the complaint is not included in the prohibition of Sec. 3894 of the Revised Statutes (against lottery) and that the accused committed no offense by depositing the circular in the mail. The Circuit Court dismissed the petition and an appeal or writ of error was taken direct to this court under Section 5 of the Act of March 3, 1891, because the constitutionality of the Statute was drawn in question.

This court in an opinion by Mr. Justice Blatchford, on page 577, said:

> "But we are of opinion that that question ought not to be reviewed by us on this appeal. The point raised is that the Austrian bond scheme was not a lottery. That is a question properly triable by the court in which an indictment may be found against Horner. He is now held to await the action of a grand jury. His case is in the regular course of criminal adjudication. It is not proper for this court on this appeal, nor was it proper for the Circuit Court, on the writ of habeas corpus, to determine the question as to whether the scheme was a lottery."

In Hughes vs. Gault, supra, the indictment was held

sufficient and the accused remanded. Mr. Justice Holmes on page 151 says:

> "We do not regard the attack upon the indictment as needing discussion. It has been upheld by a number of district courts and by the circuit court of appeals for the sixth circuit as sufficient for removal purposes."

The question there presented was whether or not the refusal of the commissioner to admit evidence of innocence was deprivation of a *constitutional* in contradistinction to a *statutory* right under the constitution.

Mr. Justice Holmes after pointing out on page 149 that "the Constitution does not require any preliminary hearing before a person charged with a crime against the United States is brought into the court having jurisdiction of the charge," then points out

> "In Tinsley v. Treat, 205 U. S. 20, 33, 51 L. ed. 689, 695, 27 Supp. Ct. Rep. 430, the conclusion is not that the appellant by being denied the right to present any evidence was deprived of his rights under the Constitution, but that he was denied 'a right secured by statute under the constitution'."

It should be pointed out that in this case, Mr. Justice Brandeis in his dissent was of opinion that

> "by refusing to hear and to consider evidence introduced or offered which bore upon the existence of probable cause, the commissioner * * * deprived the petitioner of his liberty without due process of law in violation of the 5th Amendment, because he was denied a fair hearing."

Reference here should be made to Circuit Judge Woolley's conception of the law as stated by this court in

Hughes vs. Gault, supra. In United States vs. Mathues (1927), 19 Fed. Rep. (2nd) 23, after referring to this case "as the latest authoritative announcement on the subject," he says "The law of that case and of other cases there approved * * * is substantially as follows:

> "One accused of crime by indictment in a distant district, though liable to trial wherever indicted, cannot be arbitrarily and summarily removed from the district of his residence, but is entitled to a preliminary hearing. Such preliminary hearing is not a preliminary trial. It is had before a committing magistrate, who may be a judge, commissioner, mayor of a city, or justice of the peace, and it is only such as will bring out the probable cause of the charge and make certain the identity of the defendant. These are the two things that must be established before the accused can be lawfully removed. In such a hearing the function of the magistrate is not ministerial but is judicial in the limited sense indicated. He must pass on the question of identity—an issue purely of fact—and also on that of probable cause. The indictment is itself evidence that there was probable cause for finding it. Of this, however, the indictment is not conclusive. Tinsley v. Treat, 205 U. S. 20, 32, 27 S. Ct. 430, 51 L. Ed. 689; its evidential effect is only prima facie. Hence the accused may attack it as not charging a crime and therefore as not showing probable cause."

III.

THE QUESTIONS PROPOUNDED AS SET FORTH IN THE COUNTS OF THE INDICTMENT ARE NOT PERTINENT TO THE INVESTIGATION AUTHORIZED BY THE SENATE.

The ultimate contention of petitioner is that the pertinency of the questions propounded should have been left

to the determination of the trial court and this because the remanding court is without jurisdiction in the premises. This contention ignores the conclusions of this Court, (1) that the question of pertinency is one of law and not of fact and (2) the burden of proving pertinency is on the petitioner.

1. Question of Pertnency is of Law for the Court.

This court in *Sinclair vs. United States* (1928) 279 U. S. 263, in an opinion by Mr. Justice Butler, held in analogy to relevancy and materiality that the question of pertinency arising under Section 102 of the Revised Statutes was *of law for the court;* and what is particularly applicable to the instant case.

> 'That it would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury."

The Sinclair case did not decide, as the Government in its brief, pg. 19, would seem to suggest, that in removal proceedings the trial court must, and the court of asylum may not decide this question. No question of removal on habeas corpus proceedings arose. The question there was raised by counsel taking the position that the inquiry of pertinency was one of fact for the jury in contradistinction to one of law for the Court.

Mr. Justice Butler, on page 299, says:

> "The reasons for holding relevancy and materiality to be questions of law in cases such as those above referred to apply with equal force to the determination of pertinency arising under Sec. 102. The matter for determination in this case was whether the facts called for by the question, were so related to the subjects covered by the Senate's resolutions that such facts reasonably could be said to be 'pertinent

to the question under inquiry.' It would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury."

2. Burden of Proof of Pertinency.

Sinclair vs. United States also settled another important and controverted question which arose at the first and second arguments of the instant case, and that is the party on whom rests the burden of showing the pertinency of the questions. His Honor Circuit Judge Buffington held in *United States vs. Barry* (1928) 29 Fed. (2nd) 817, that the burden rested on the Government, saying on page 821,

"But a ruling on the admissibility of evidence is not made on surmises. It is based on the ground that the burden of showing the relevancy of any testimony which is objected to is on him who proposes to give it."

Mr. Justice Butler in the Sinclair case held as matter of law that in criminal prosecution under Section 102 of the Revised Statutes the burden rests *"on the United States to plead and show that the questions pertained to some matter under investigation"*. He says on page 296:

"Appellant earnestly maintains that the question was not shown to be pertinent to any inquiry the committee was authorized to make. The United States suggests that the presumption of regularity is sufficient without proof. But, without determining whether that presumption is applicable to such a matter, it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and

show that the question pertained to some matter under investigation."

It requires no demonstration that the remanding court *must* have jurisdiction to determine the question of probable cause in removal proceedings, if the indictment is not conclusive but only prima facie evidence of the existence of a crime and if the burden is on the Government to prove "pertinency" as the essential element of the crime charged in the indictment. Likewise, neither a question of fact can arise nor necessity exist for remanding the question of "pertinency" to the trial court, if the determination of this question is one of law and not of fact.

In the present case every act and word of the defendant which possibly could appertain to the crime charged in the indictment, are therein set forth. Those facts are free from all doubt or dispute, palpably are not "pertinent" and there is no question of statutory construction involved.

It is then obvious that the inquiry of probable cause, becomes a futile mockery, section 1014 of the Revised Statutes is ignored and an innocent man suffers the ignominy of false imprisonment; if the court of asylum may not decided as matter of law that no crime exists because of non-pertinency, but must hold in custody the accused and remand him to the trial court for its determination of the fact previously proved in the remanding court and of the law already established therein to its satisfaction.

Pertinency Not Decided in Barry vs. United States Ex Rel. Cunningham; But Distinction Made Between Judicial and Legislative Funtion.

This Court in an opinion by Mr. Justice Sutherland in Barry vs. United States ex rel. Cunningham (1928) 279 U. S. 597, in the paragraphs following, makes a dis-

tinction between the pertinency of questions when asked by the Senate at its bar and when asked by one of its committees; and explicitly refused to pass upon the pertinency of the instant questions which the committee propounded.

Page 612:

> "We must accept this unequivocal language (contained in respondent's answer 'to bring Cunningham to its bar * * * to answer * * * questions pertinent') as expressing the purpose of the Senate to elicit testimony in response to questions to be propounded at the bar of the Senate, and the question whether the information sought to be elicited from Cunningham by the committee was pertinent to the inquiry which the committee had been directed to make may be put aside as immaterial."

Page 619:

> "It is not necessary to determine whether the information sought was pertinent to the inquiry before the committee, the scope of which was fixed by the provisions of the Senate resolution. But it might well have been pertinent in an inquiry conducted by the Senate itself, exercising the full, original and unqualified power conferred by the Constitution."

The importance of this distinction in the pending case lies in the differentiation between (a) the legislative and (b) judicial functions of the Senate, and particularly, in the express statement that the instant questions might become pertinent only if and when asked *by the Senate at its bar in performance of its judicial function of passing "upon the validity of Vare's election"*.

A. The Judicial Function.

The following deleted excerpts from the opinion of Mr. Justice Sutherland in the Barry case, supra, amplify the distinction and make clear the nature of the Senate's judicial function p. 613:

"Generally, the Senate is a legislative body, exercising in connection with the House only the power to make laws. But it has had conferred upon it by the Constitution certain powers which are not legislative but judicial in character. *Among these is the the power to judge of the elections, returns and qualifications of its own members.* * * * 'That power carried with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections', Reed v. County Commissioners, 277 U. S. 376, 388. Exercise of the power necessarily involves the ascertainment of facts, the attendance of witnesses, the examination of such witnesses, * * * In exercising this power, the Senate may, of course, devolve upon a committee of its members the authority to investigate. * * * *When evidence is taken by a committee, the pertinency of questions propounded must be determined by reference to the scope of the authority vested in the committee by the Senate.* * * *But the Senate* * * * *may* * * *dispense with* * * * a committee and itself take testimony * * * * * * and * * * may resume charge of the inquiry. * * * In that event, the limitations put upon the committee obviously do not control the Senate; but that body may deal with the matter, without regard to these limitations, subject only to the restraints imposed by or found in the implications of the Constitution."

The learned Justice then says, pg. 619:

"The Senate having sole authority under the Constitution to judge of the elections, returns and qualifications of its members, may exercise in its own right the incidental power of compelling the attendance of witnesses without the aid of a statute."

He then points out that Cunningham "upon examination by the committee * * * repeatedly refused to answer questions which the committee deemed relevant and of great importance" and then says:

"These questions have already been recited and it is impossible for us to say that the information *"sought and refused would not reflect light upon the validity of Vare's election."*

It is evident then that this court, in support of its conclusion of the Senate's power to "bring Cunningham to its bar", suggested the possible pertinency of questions to be asked in the future by the Senate at its bar in exercise of its judicial function of passing upon the qualifications of Vare; but refused to pass upon the pertinency of the instant questions which relate alone to primaries and were asked by the Senate's committee under its limited authority in performance of its legislative function.

B. The Legislative Function.

The instant questions were asked by the committee in the performance of a legislative function, else why the distinction which Mr. Justice Sutherland makes; for if asked in exercise of the judicial function, their pertinency became material and required answer in the Barry case with the same force as if asked by the Senate when passing upon the qualifications of Vare as a member. The (a) reason for and (b) necessity of the distinction are as clear as the fact is conclusive that the committee when it

asked the questions, was not functioning as a judge of Vare's qualifications.

A. The reason for the Distinction.

The instant indictment alleges that the questions were asked on *February 21st, 1927*, during the second session of the 69th Congress, which ended March 4th, 1927, and Vare was elected as a member of the 70th Congress for the term of six years *"beginning on the 4th day of March 1927"*, as stated by the respective certificates of Governor Pinchot (page 51 R. U. S. Cir. Ct. of Appeals, U. S. vs. Barry) and Governor Fisher, page 5, Appellant's Paper Book U. S. Sup. Ct. Barry vs. U. S. ex rel. Cunningham and p. 13 U. S. Circuit Ct. of Appeals; and his qualifications as a member could be passed upon only after he had become a member and then only in and by the Congress of which he was a member.

In short, although the Senate is a continuing body, its power, either as a whole or through its committees, to judge of the qualifications of a member, is contemporaneous with the term of the member; it arises in the Congress when his term begins and ends with the expiration of his term; although the oath of membership is not administered and he is denied his seat, and *notice of the contest must be filed and evidence relative to the election may be taken.*

It cannot be concluded that the limited authority of the special committee to investigate the primaries for a legislative purpose was so enlarged by Resolution No. 324 as to give to it the Senate's unlimited judicial power of judging the qualifications of Vare, from the mere fact that Wilson filed notice of a contest and the Senate authorized the special committee "to take and preserve evidence in connection with the election of a senator from Pennsylvania on November 2nd, 1926."

The indictment explicitly charges that the authority of the Committee and the purpose of its investigation was to determine the necessit

The indictment explicitly charges that the authority of the Committee and the purpose of its investigation was to determine the necessity of additional legislation. There is no suggestion therein contained of either the authority or purpose of the Committee to judge Vare's qualifications.

The indictment (pages 14 and 15, Transcript of Record) avers that the --

> "said Committee was empowered and directed to investigate * * * the alleged fraudulent and corrupt and unlawful practices in connection with the nomination and election of candidates for the * * * Senate, * * * and to report its findings and recommendations to the Senate with a view to enabling the Senate to ascertain and determine what, if any, other or additional legislation might be advisable in the premises; * * * that the said Committee did * * * exercise that authority, * * * make such investigation for the purpose of making such report, findings and recommendations to the Senate, with a view to enabling the Senate and to ascertain and determine what, * * * additional legislation might be advisable, and * * * for that purpose * * * did hold * * * hearings at which witnesses were * * * produced."

No power is delegated by the Senate in its Resolution No. 324 (R. U. S. Cir. Ct. of Appeals, U. S. vs. Barry, pg. 45), in the second session of the 69th Congress *to judge of Vare's election*, because neither it nor its committee could judge in the 69th Congress the election of a member to the 70th Congress.

The Senate refrained from adopting any resolution until the first session of the 70th Congress, either to refer the contest between Wilson and Vare to any committee or to delegate to any committee power to judge of the election.

It was not until December 17th, 1927, that the Senate adopted its Resolution 68 (Transcript of Record, U. S. Circuit Court of Appeals, U. S. ex rel. Cunningham vs. Barry, pg. 53) with the following recital:

> "Whereas on the 4th day of March, 1927, the Senate referred to the Committee on Privileges and Elections, the pending contest between * * * Vare and * * * Wilson"; and conferred on that committee the authority to "hear and determine said contest, * * * to take * * * evidence * * * and to certify its conclusions to the Senate."

If there be any doubt that the special committee on February 21st, 1927, at the second session of the 69th Congress was without power to judge the qualifications of Vare, it should be dissolved by the following facts:

(1) The special committee made neither report nor recommendation at the opening of the first session of the 70th Congress on Vare's election; and (2) its Resolution No. 2 was adopted on December 9th, 1927, which declared that Vare's credentials were "tainted" and referred his "claim * * * to a seat in the * * * Senate to the special committee"; and (3) the indictment charges a legislative purpose.

(P. 15, Transcript.)

Admittedly the Senate by Resolution 2 and Resolution 68 adopted respectively December 9th and December 17th, 1927, conferred upon its standing Committee on Privileges and Elections and the special committee, the judicial function to judge of Vare's qualifications; *and a different question would arise if the instant questions had been propounded by either the special committee or the standing committee in the 70th Congress after the adoption of the Resolutions, instead of being asked at the second session of the 69th Congress before the adoption of either of said Resolutions.*

The following closing sentence of the opinion of this Court by Mr. Justice McReynolds in Newberry v. United States (1920), 256 U. S. 231, at pg. 258, would seem to indicate the propriety of such questions if asked in exercise of a judicial function:

> "As each 'House shall be the judge of the elections, qualifications and returns of its own members'. and as Congress may by law regulate the times, places, and manner of holding elections, the national government is not without power to protect itself against corruption, fraud, or other malign influences."

The dissenting opinion of Mr. Justice Pitney criticises this conclusion as follows, pg. 285:

> "In support of a narrow construction of the power of Congress to regulate 'the manner of election' of its membership, it is said there is a check against corruption and kindred evils affecting the nominating procedure, in the authority of each House to judge of the elections, returns, and qualification of its own members; the suggestion being that if—to take a clear case—it appeared that one chosen to the

Senate had secured his election through bribery and corruption at the nominating primary, he might be refused admittance. Obviously, this amounts to a concession that the primary and the definitive election, whose legal separateness is insisted upon, are essentially but parts of a single process; else how could the conduct of a candidate with reference to the primary have legitimate bearing upon the question of his election as Senator? But the suggestion involves a fundamental error of reasoning. The power to judge of the elections and qualifications of its members, inhering in each House by virtue of section 5, of Art. 1, is an important power essential in our system to the proper organization of an elective body of representatives. But it is a power to judge, to determine upon reasonable consideration of pertinent matters of fact according to established principles and rules of law; not to pass an arbitrary edict of exclusion. *And I am unable to see how, in right reason, it can be held that one of the members of Congress, in the just exercise of its power, may exclude an elected member for securing by bribery his nomination at the primary, if the regulation by law of his conduct at the primary is beyond constitutional power of Congress itself.*"

(b) The necessity for the distinction arises from the two facts following:

(1) Every question asked by the committee in the 69th Congress on February 21st, 1927, relates to the Pennsylvania primaries or nomination of Vare, and not one question to his *election*.

(2) It was on March 22, 1928, in the 70th Congress that the Senate passed its resolution to bring "Cunning-

ham before the bar of the Senate" then and there to be interrogated.

It is the ignoring by the Government of the fact that neither the Senate nor its committee on the 21st day of February, 1927, in the 69th Congress had power to pass upon the qualifications of Vare as a member of the 70th Congress whose term began on the 4th day of March, 1927; and the further fact that every question asked related to the Pennsylvania primaries or nomination of Vare, and not to his election, and also the failure to observe the resultant distinction between the propounding of the questions by the committee in exercise of a legislative function within the limits of its delegated authority and their being asked by the Senate in performance of the judicial function of passing upon the qualifications of a member, that led the Government in its brief on re-argument in the court below, pgs. 2, 3, and 4 and in its brief filed in this Court, pgs. 8 and 17, to stress the following sentence in the Barry case:

> "It is impossible for us to say that the information sought and refused would not reflect light *upon the validity of Vare's election*";

And, on page 17 of its brief in this Court and more fully in its brief on pages 2, 3 and 4 of reargument in the court below to urge that the Barry case rules the instant case and to argue that,

> "If it was impossible for the Supreme Court to say in advance that the questions, charged in this indictment, were not pertinent to the inquiry before the Senate Committee, surely it is likewise impossible for the remanding court * * * to say in advance that under no circumstances could the questions be pertinent * * * The Government submits that the deliver-

ance by Mr. Justice Sutherland * * * cannot be viewed other than as an affirmance of the deliverance of the District Court in the present proceeding. (26 Fed. 2d 272) where Dickinson, J., said:

> 'The broad question of the propriety of a particular interrogatory, or the narrower one of the relevancy or pertinency of evidence to be elicited thereby, *is a question which cannot be ruled upon consideration of the naked question alone. It must have read into it all its environments, including the atmosphere of the trial, and the personality and demeanor of the witness. None but the trial court, or an appellate court upon a review of the whole trial, can make the called-for ruling.*' "

It is submitted that the Circuit Court of Appeals in its final opinion by Judge Buffington, wherein on reargument it adhered to its original conclusion, demonstrates the patent error of the above contention, clarifies the distinction made by Mr. Justice Sutherland and states the vital issue involved in this case, as follows: (pg. 51-52, R., U. S. Supreme Ct., Mathues vs. U. S. ex rel Cunningham.)

> "After the opinion of this Court was filed, the case of Barry v. Cunningham, 279 U. S. 597, was decided. Thereupon the Government, conceiving that our decision was at variance with the holdings of the Supreme Court in that case, moved a rehearing be had * * * We * * * confine the present opinion to a * * * statement of why we do not regard the Barry case as ruling the present one. The indictment in the present case * * * concerns solely what had already taken place before a Committee of the Senate.

When Cunningham refused to answer the questions propounded by that Committee, his crime * * * if such it be, was completed, and for that completed crime he was indicted. *As his entire acts were set forth in the indictment,* the Court, on the application for removal, was required to determine whether probable cause was shown. * * * we held the lack of probable cause * * * in that the inquiry made of Cunningham was not pertinent *because no power had been conferred by the Senate on this Committee to make such inquiry.*

On the other hand, the case of Barry vs. Cunningham, supra, as held by the Supreme Court, concerned what took place afterwards; namely the action of the Senate in attaching Cunningham and bringing him before it 'then and there or elsewhere * * * to answer such questions pertinent * * * as the Senate * * * may propound'. It will thus be seen that so far as questions to Cunningham are concerned the indictment in the present case concerned questions already asked and refused to be answered, while the Barry case concerned questions to be asked in the future * * *.

This question of the pertinency of those questions, which the Supreme Court thus stated it did not pass upon, is the very question which we did then pass upon and which we are now constrained to pass upon in the present case * * * we adhere to our previous opinion and do not * * * disregard the holdings of the Supreme Court."

3. Questions Not Pertinent.

The hinge inquiry in determining the pertinency of the instant questions does not then turn, as suggested by Judge Dickinson in his first opinion in the District Court below and as contended by the Government, on the "en-

vironments and atmosphere of the trial and the personality and demeanor of the witness"; but rather the pivotal inquiry is the power of the committee to ask the questions in exercise of its legislative function and within the limits of the authority delegated by the Senate. This is a matter of law for the remanding court and not of "atmosphere" of the trial court.

The considerations are decisive of that inquiry are (1) the scope of the committee's delegated authority and (2) the subject-matter of the questions propounded.

The questions set forth in the indictment were not "pertinent" for three reasons,

(a) Their subject-matter was not relevant to the inquiry authorized by the Senate;

(b) Related alone to the "Pennsylvania Primaries" and the Senate, being without constitutional authority to legislate respecting primary elections, lacked the power in performance of a legislative function to investigate them; and

(c) The Senate may not impeach the credibility of its own witness by irrelevant questions relating to his own personal affairs.

Before considering these reasons in the order of their statement, attention should be called to the three well-settled principles of law as stated by this Court.

1. That the indictment shall set forth every element or ingredient of the crime charged.

Mr. Justice Clifford in United States vs. Cook (1872), 17 Wall, 168, said at pg. 174:

> "With rare exceptions, offences consist of more than one ingredient, and in some cases of many, and

the rule is universal that every ingredient of which the offence is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad and may be quashed on motion, or the judgment may be arrested, or reversed on error."

2. It is not sufficient to set forth the offense charged in the words of the statute, in the instant case "*pertinent*".

In United States vs. Carll (1881), 105 U. S. 611, Mr. Justice Gray, at pg. 612, says:

"In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; and the fact that the statute in question read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

The reason for this principle of law is thus stated by Mr. Chief Justice Waite in United States vs. Cruikshank, (1875), 92 U. S. 542, as follows, pg. 557:

"These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of 'every each and all and singular' the rights granted them by the Constitution, &c. There is no specification of any particular rights. The language is broad enough to cover all.

> The object of the indictment, is, first to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

In Roberts vs. Riley (1885), 116 U. S. 80, this Court applied the above principle in removal proceedings. Mr. Justice Matthews states at pg. 95 that the *first* of the three considerations in removal proceedings is "that the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled". He then states what is particularly applicable to the instant case, pg. 95:

> *"The first of these prerequisites is a question of law, and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of habeas corpus."*

See also Blitz vs. United States (1893), 153 U. S. 312, at pg. 315.

3. In Sinclair vs. United States, supra, Mr. Justice Butler after quoting from McGrain vs. Daugherty (1926), 273 U. S. 135, says pg. 292, on the protection of the individual from arbitrary inquiry into his private affairs says:

"And that case shows that, while the power of inquiry is an essential and appropriate auxiliary to the legislative function, it must be exerted with due regard for the rights of witnesses, and that a witness rightfully may refuse to answer where the bounds of the power are exceeded or where the questions are not pertinent to the matter under inquiry.

It has always been recognized in this country, and it is well to remember, that few, if any, of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs."

(a) *The relevancy of the questions makes necessary an inquiry as to the scope of the authority which the Senate delegated to its special committee and to the manner in which the questions by the respondent were met.*

Resolution 195 of the 69th Congress authorized the appointment of a Special Committee, defined the scope of its inquiry and granted to it powers incidental and necessary to the performance of its duties.

The limit of the authority of the special committee was in its language to "investigate what moneys * * * or things of value * * * have been promised, contributed, made or expended * * * by any person, firm, corporation or committee, organization to influence the nomination of any person as a candidate * * * for membership in the United States Senate, or to contribute to or promote the election of any person as a member of the United States Senate at the general election to be held in November, 1926."

The resolution then instructs the Committee to "report the names of the persons, firms or corporations, etc.,

* * * that have made * * * such promises * * * or payments and the amount of them * * * together with all facts in relation thereto."

The funds of money raised, the names of the contributors and the amounts contributed together with the relevant facts to influence the nomination of any person as a candidate for the United States Senate at the general election to be held in November, 1926, constitute the subject-matter and embrace the scope of the Committee's authority.

The witness testified truthfully and concisely to his official position and the different business in which he was interested; to the facts (a) of two contributions, (b) the amount of each (c) the form in which made (d) to whom and (e) when the respective contributions were made; and specifically testified that (f) the contributions were his personal donation and (g) from his personal estate.

He refused to answer any question (a) touching upon his wealth or (b) the course or (c) the manner of its accumulation or (d) out of what part of his personal estate either contribution came, or (e) how long the part contributed had been his property.

The opinion of the Circuit Court of Appeals by Judge Buffington, (pg. 58 R. Sup. Ct. Barry vs. U. S. ex rel. Cunningham) sets forth the questions which respondent answered, as well as the questions bearing on the inquiry which he answered fully and also the questions which he did not answer because by him deemed not pertinent. The opinion then states the scope of the inquiry as follows, (pg. 68 R. Sup. Ct. Barry vs. U. S. ex rel. Cunningham).

"Turning, then, to the underlying question, was Cunningham in contempt in declining to answer the questions asked? The answer to that is, Were such

questions relevant to the inquiry the Committee was authorized to make? That inquiry, so far as here pertinent was 'to investigate what moneys * * * have been * * * contributed * * * by any person * * * to influence the nomination of any person as a candidate * * * for membership in the United States Senate at the General Election to be held in November, 1926.' Such being the items of inquiry, the resolution provided for a report thereof to the Senate by the Committee of such items, viz., 'said committee shall report the names of the person * * * that have made such * * * payments and the amounts by them severally contributed * * * including the methods of expenditure of said sum * * * together with all facts in relation thereof.' And that the matters so specified constituted the scope of the committee's inquiry was evidenced by the resolution providing for imposing the penalties of Revised Statute 102 upon a witness who 'having appeared refused to answer any question pertinent to the investigation heretofore authorized.''

The opinion then proceeds with careful analysis to point out that the respondent had given full testimony and complete answer on every possible element of the inquiry and that the questions propounded are not pertinent, saying, (pg. 68 R. Sup. Ct. Barry vs. U. S. ex rel. Cunningham).

"Turning to the inquiry heretofore specified as authorized, we note that Cunningham, as bearing on 'what moneys * * * have been contributed,' testified he had contributed fifty thousand dollars. As bearing on the question whether such money was contributed 'to influence the nomination of any person as a candidate for membership in the United States Sen-

ate', he testified that he paid the money to Thomas F. Watson, treasurer of a political organization which was supporting Vare for nomination for United States Senator and Beidleman for Governor; that while he favored and supported Vare as a candidate his whole object in giving the money was to assist Beidleman, and if Beidleman 'had not been on the ticket I would not have given it.' Touching the subject of investigation described as 'including the method of expenditure of said sums', Cunningham testified he did not know whether his contribution had been reported in Beidleman's campaign expenses, adding 'I instructed Mr. Watson what my thought was about it.' It will thus be seen that Cunningham answered the questions asked him on the subjects specified in the resolution and that his answers enabled the committee, so far as the inquiry concerned him to fulfill the specified duties of their appointment, viz: to 'report * * * payments and the amount by them severally contributed * * * including the method of expenditure of said sums.' Such being the case, we do not see that proof of how Cunningham came by the money he says he thus personally contributed, could affect the objects of investigation referred to by the Senate to the Committee."

It is evident that the counts of the indictment do not disclose the essential elements of the crime charged in that standing alone, none of the counts shows the pertinency of the questions propounded; but palpably and patently, are not within the scope of the committee's delegated authority.

(b) *The subject-matter of every question pertained to the Pennsylvania primaries, related to contributions to the fund raised for the purpose of nominating Vare, and not to the general election, and were asked in the exercise of a legislative function.*

It is then obvious that no question here arises as to the power of the committee under authority of the Senate's delegated authority to ask on February 21st, 1927, questions relating to the *election* of Vare; for the crime charged in the indictment does not appertain to such inquiry, but sets forth questions relating only to his *nomination.*

The inquiry here and now presented is whether or not the questions as to the Pennsylvania primaries which the committee actually asked and Cunningham refused to answer, were propounded in the exercise of a constitutional function.

On May 18th, 1926, the Pennsylvania primary was held; on May 19th, 1926, Senate Resolution 195 was passed which gave to the special committee authority to investigate that primary; and on July 22nd, 1926, Cunningham testified before the committee at Chicago. At this stage the special committee was empowered, in exercise of a legislative function, to inquire alone into the nomination of senators. The general election had not taken place and the scope of the inquiry necessarily was limited to the primaries at which Vare was nominated, for the purpose of enacting laws regulatory of primaries.

The general election was held November 2, 1926; on January 8th, 1927, Wilson filed *notice* of his contest and on January 11th, 1927, the Senate passed Resolution 324 which authorized the "select committee * * * to take and preserve evidence in connection with the election."

The election contest could not and was not referred to any committee of the Senate until March 4th, 1927, and

then to the standing committee on Privileges and Elections. On that date Vare presented his credentials and on December 9th, 1927, the Senate at the first session of the 70th Congress by resolution 2 referred the "tainted" claim of Vare to the special committee. On December 17th, 1927, Senate Resolution 68 was adopted which conferred on the committee on Privileges and Elections authority "to hear and determine the contest." (Wilson-Vare).

It has been demonstrated in the prior pages of this brief that the questions charged in the indictment were asked on February 21st, 1927, while the Senate and the special committee in the 69th Congress were exercising a legislative function (pages 36-37), and that no judicial function was conferred on any committee by the Senate until the 70th Congress by Senate Resolutions 2 and 68. (Pages 37-38.)

It is then submitted that the questions as set forth in the instant indictment were asked by the special committee when it was exercising a legislative and not a judicial function; and that since the questions related to the nomination of Vare at the primary, as to which under Newberry vs. United States, supra, there can be no valid legislation, that the special committee was without constitutional authority to ask them.

In this case Senator Newberry was convicted of violating the several Acts of Congress which may be designated as the "Corrupt Practices Acts." These statutes provided in substance that no candidate for Congressman or Senator shall contribute for his nomination and election an amount in excess of that allowed under the laws of his State, and in no event in excess of $10,000.00.

The indictment charged contributions in excess of the allowed sum for his nomination and election. The court below overruled a demurrer as to the unconstitutionality of the statutes.

This Court in an opinion by Mr. Justice McReynolds, held that the Acts were unconstitutional because as by him stated on page 258:

> "We cannot conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections. The fair intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted. On the other hand, its exercise would interfere with purely domestic affairs of the state, and infringe upon liberties reserved to the people."

This was based on the conclusion as expressed in the syllabus as follows:

> "The only source of power which Congress (prior to the adoption of the 17th Amendment) possessed over elections for Senators and Representatives was U. S. Const., Article 1, par. 4, which empowers Congress to regulate the manner of holding such election."

In the view of Justice McReynolds the construction of this clause of the Constitution, as by him expressed on page 247, is "the ultimate question for solution."

The learned Justice refers to the fact that all of the Acts of Congress were enacted prior to the 17th Amendment to the Constitution; but expresses the opinion that this Amendment (page 252):

> "as finally submitted and adopted * * * does not undertake to modify Article 1, Section 4, the source of Congressional power to regulate the times, places,

and manner of holding elections. That section remains 'intact and applicable both to the election of Representatives and Senators.' "

Mr. Chief Justice White and Mr. Justice Pitney wrote dissenting opinions, the latter concurred in by Justices Brandeis and Clark, wherein they conclude that Congress had the power to legislate as to primaries, since an essential part of the election.

Mr. Justice McKenna concurred in the opinion of the majority but "reserves the question of the power of Congress under the Amendment."

In Chandler vs. Neff, 1924, 298 Fed. 515-519, Texas passed a law excluding Negroes from the right to vote in primary elections. The question was whether this violated the Fourteenth and Fifteenth Amendments. It was held that it did not because Congress had no right under the Constitution to regulate a primary.

District Judge West says (page 519):

"Any reasonable test of party affiliation may be required by the Legislature. Many cases are cited in support of this principle. A reference to the Digests, Corpus Juris and Cyc. gives numbers of citations in support of the point. In direct line with these authorities is the case of Koy v. Schneider, 110 Texas, 369, 218 S. W. 479, 221, S. W. 880, also Waples v. Marrast, 108 Tex. 5 184 S. W. 180. L. R. A. 1917 A 253.

"The balancing of authorities and the weight of authority if in doubt is settled by the Supreme Court of the United States in Newberry vs. United States, 256 U. S. 232, 41 Sup. Ct. 469, 65 L. Ed. 913. It was there held that primary elections 'are in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they

intend to offer and support for ultimate choice by all qualified electors'. It therefore may be considered as determined that the State of Texas was within its powers in providing its tests of qualification of Democratic electors, and in providing by its articles that Negroes were not permitted to vote in a democratic primary election it was within the due exercise of its police powers which were reserved to it."

In Nixon vs. Herndon (1926), 273 U. S. 536, this primary law was stricken down by this Court because it deprived Negroes of the equal protection of the laws.

In United States vs. Cameron, 1922, 282 Fed. 684, District Judge Van Flett says:

"We cannot conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections. The fair intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted. On the other hand, its exercise would interfere with purely domestic affairs of the state and infringe upon liberties reserved to the people."

The following excerpt from the opinion of Mr. Justice Clark, in the case of United States vs. Gradwell, 243 U. S. 476, in this connection should be given (page 487):

"The constitutional warrant under which regulations relating to congressional elections may be provided by Congress is in terms applicable to the 'times, places, and manner of holding elections (not nominating primaries) for Senators and Representatives.' Primary elections, such as it is claimed the

defendants corrupted, were not only unknown when the Constitution was adopted but they were equally unknown for many years after the law, now #19, was first enacted. They are a development of comparatively recent years, designed to take the place of the nominating caucus or convention, as these existed before the change, and even yet the new system must be considered in an experimental stage of development under a variety of state laws."

It is then evident that at the time of the passage of the Resolution 195 Congress was without power to enact legislation, regulatory of the nominations of Senators. It must then follow as a necessary conclusion that being without legislative power to enact such laws, the Senate was without power to investigate facts relating to *nominations* of Senators preparatory to and for the sole purpose of formulating such legislation.

It should be further called to the attention of the Court that both the Senate and House of Representatives prior to the passing of Resolution 195 have acquiesced in and directly recognized the Constitutional inhibition which the Newberry case places on their power to enact legislation either regulatory of or relating to NOMINATIONS for either branch of Congress.

While Senators may disagree with the law as announced in the Newberry case; yet no Act of Congress affecting nominations has been enacted since that decision and the only statute enacted subsequent to it, as by Mr. Justice McReynolds therein suggested "to protect * * * against corruption, fraud or other malign influences" in elections, is the statute approved February 28th, 1925, (43 Statutes at Large 1071).

This act provides for publicity of campaign contributions and in express terms relates to *elections* only in a contradistinction to nominations. An election as therein

defined does not include "*either a primary election or a Convention of a political party.*"

It is then finally submitted that the Senate being without constitutional power to legislate relative to the nominations of Senators by primary election or convention, is without authority to empower a special committee to make investigations into the nominations for the purpose of such legislation.

(c) *The Senate may not impeach the credibility of its own witness by irrelevant questions relating to his own personal affairs.*

No effort is made in petitioner's argument to meet the burden which this Court in Sinclair vs. United States, supra, imposes upon him, to show the pertinency of the questions, other than to urge their pertinency to test credibility. Petitioner's brief page 16 says:

> "The questions * * * were designed to test the veracity of his (respondent's) testimony."
>
> "Apparently that court (Circuit Court of Appeals Below) failed to appreciate the necessity of testing the respondent's veracity."

With deference, this is arguing in a circle and ignores both the statutory definition of the crime for which respondent is indicted and an elementary rule of evidence. The sole inquiry in this case is *pertinency,* for the crime charged is refusal to answer questions "pertinent" to a certain inquiry.

It is submitted that the Government cannot predicate "*pertinency*" on *credibility* without changing the crime to refusal to answer questions "testing veracity", as well as violating the evidential rule that its own witness may not be contradicted by cross-examination that is not *relevant or material.*

It is true that while there is conflict, yet the weight of authority holds that the discretion of the court is the only limit imposed on the wide latitude permitted in impeaching through contradiction of an *adverse* witness by cross-examination on non-relevant and collateral matters; but the rule would seem universal that the veracity or credibility of one's *own witness* may be impeached through contradiction, only by a cross-examination which is *relevant and material to the issue.*

The Government's contention necessarily assumes that the questions, being asked for the purpose of testing veracity, were pertinent or relevant. The respondent is here indicted for refusal to answer "pertinent" not veracity testing questions, nor for perjury for false answers.

It is obvious that a question not pertinent or relevant, cannot become "pertinent" because it is intended to test veracity; and that it is the *subject-matter* of the question and not its *purpose* which determines its relevancy or pertinency.

It is then the ignoring of the essential of the crime and of the distinction between impeaching one's own witness by contradiction through cross-examining him as to the *relevant or pertinent facts* and *irrelevant* and *collateral matters,* which leads to the Government's erroneous contention (petitioner's brief, p. 16) that respondent should be exposed "to a most searching examination *as to the source of*" his contributions to Vare's *nomination,* "for the purpose of enabling the committee to determine whether he was telling the truth."

This distinction is stated by Dr. Wigmore in his treatise on Evidence, Vol. 2, Sec. 878, pg. 242, where in pointing out the difference between cross-examination and extrinsic evidence in testimonial impeachment, he says "two things must be kept in mind":

"1. The question of relevancy is not touched by

them * * * it prescribes that such and such evidence, *if relevant* is to come only from a specific source. Its relevancy is still open to question, e. g., in evidencing bad character * * * we are still confined to facts that are relevant for the purpose, and we may at any moment be told that a given fact about which we are cross-examining * * * is not relevant."

"2. Thus there is no virtue in the cross-examination as such with reference to the admissibility of the alleged fact. The notion is now that because we are cross-examining, therefore we may get admission for this or that fact; for the fact cannot go in if it is not relevant; but the notion is that because we are not using extrinsic testimony, the fact is relevant may go in.

It is important to observe this, because the ordinary discussion of the rule of thumb leads often to a notion (for which the judges indeed are not responsible) that cross-examination has some mysterious virtue of its own which imparts merits to facts otherwise worthless. A loose belief doubtless obtains in some minds that almost anything may go in on cross-examination (saving the discretion of the Court). Conceptions of this sort should be radically abandoned. *Cross-examination is no universal solvent for reducing everything to admissibility. The notion is not only unsound, but misleading.*"

In Section 1003, pg. 435, Vol. 2, the learned author gives the test of relevancy or collateralness, which is decisive against the Government's contention:

"The common term for designating the line of exclusion is 'collateral'; *no contradiction*, we are told, *shall be permitted on 'collateral' matters.*

> But this term furnished no real test * * * The test that is dictated by the principle above explained, and the only test in vogue that has the qualities of a true test—definiteness, concreteness, and ease of application—is that laid down in Attorney-General v. Hitchcock: *Could the fact, as to which error is predicated have been shown in evidence for any purpose independently of the contradiction?*"

He then points out in Vol. 2, section 1004, pg. 437, et seq., that facts are not "collateral" which are relevant to the issue or which are relevant to the discrediting of a witness; e. g., his moral character, bias, corruption, skill, intoxication, illness, opportunity to observe, recollection, narration or prior inconsistent statement.

"But", as stated by Greenleaf on Evidence Vol. 1, (Lewis's Edition) Sec. 449, pg. 737, "it is a well-settled rule that a witness *cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony.*"

Again in Sec. 455, pg. 747, Greenleaf says:

> "Where the question is not material to the issue, but is collateral and irrelevant, being asked under the license allowed in cross-examination, it stands on another ground. In general, as we have already seen, the rule is, that upon cross-examination to try the credit of a witness, only general questions can be put; *and he cannot be asked as to any collateral and independent fact, merely with a view to contradict him afterwards by calling another witness.*"

Cyclopedia of Law and Procedure, Vol. 40, pg. 2564 states the general rule as to cross-examining any witnesses, adverse or the cross-examiner's own as follows:

"On cross-examination it is permissible to ask a witness questions for the purpose of testing his reliability and affecting his credit, and for this purpose great latitude is allowed. * * * (pg. 2566) *A witness cannot under pretense of impeachment * * * be interrogated as to matters not relevant to his credit and which the cross-examining party has no right to bring out for other purposes; and a question on cross-examination tending to insinuate that the witness is testifying untruthfully is bad.* Neither should the door be thrown open so wide for impeaching evidence as to allow questions to be asked upon the pretense that the object is impeachment, when there is no reasonable ground to expect favorable answers or to be able to prove by direct evidence that the unfavorable ones are false, and the sole tendency, if not the purpose, is to create suspicion in the minds of the jury."

Cyclopedia of Law and Procedure, Vol. 40, pg. 2766, states the rule which is particularly applicable to the instant case relative to the limitations of contradicting one's own witness by cross-examination:

"A party has a right to contradict his own witness by independent evidence showing the facts to be different from those testified to by such witness, although the incidental effect of the introduction of such evidence is to materially discredit the witness; *but a party cannot contradict his own witness where the only effect of the contradiction is to impeach the witness and not to give any material evidence upon any issue in the case.*"

At page 2769, Cyc. Vol. 40, gives the rule as stated in the above excerpt from Wigmore.

Vol. 28, R. C. L., secs. 226-277 set forth the rules as above stated by Wigmore, Greenleaf and the Cyclopedia of Law and Procedure. Section 227 follows:

> "It is well settled that although a party may not impeach his own witness directly, he may show that the statements made by him are not in fact true, and thus incidentally discredit him. * * * *While a party may contradict his witness as to a fact material in the cause, although the effect of that proof may be to discredit him, he cannot adduce such a contradiction when it is only material as it bears upon the witness's credibility.*"

It is deemed unnecessary to cite cases in support of the foregoing rule of evidence. Its *only* exception, however, should be adverted to. A legal witness, i. e., one who must be called to prove a particular fact, e. g., a subscribing witness, may be impeached by cross-examination in the same manner and to the same extent as if he were an adverse witness. It cannot be suggested that Cunningham is within the exception.

It should be recalled that the Senate subpoenaed respondent as its witness to appear before its committee in its investigation of Vare's nomination; that he denied the power of the Senate or its committee to make such investigation for a legislative purpose; that he volunteered and gave information as to the amount and purpose of his individual contributions; and that he refused to answer the instant questions because (a) not within the power of the committee and (b) their personal nature. The following statement made by respondent's counsel at the hearing, should here be inserted (pg. 69 Tr. of Record):

> "Mr. Golder: I have advised Mr. Cunningham that, in my judgment, this committee has no juris-

diction to inquire into the primary election held in Pennsylvania; that it is only a local matter for the Commonwealth of Pennsylvania; and that in my professional judgment he can answer those questions which he sees fit dealing with the primary election, and that he may refuse to answer those questions which he considers his own personal business. I have further advised Mr. Cunningham that he need not disclose to this committee from what part of his personal estate, or personal fortune, he paid the money, to Mr. Watson that he did pay during this last campaign in Pennsylvania.

I thought I would state that as a matter of record so that I would not have to object each time a question is asked."

The Government does not suggest that the information by him voluntarily given before the committee makes competent the instant questions, but in this connection an illuminating statement by Wigmore should be called to the attention of this Court. After referring to the general rule of exclusion of collateral and immaterial matters, he gives the following reason for the rule that information volunteered on direct-examination does not render competent cross-examination upon immaterial matters:

Vol. 2, Sec. 1007, pg. 447: "Occasionally, before the theory had been completely worked out by the Courts, the argument of Unfair Surprise was treated as the only objection, and it was thought that where the *assertion* desired to be contradicted had been *made on the direct-examination*—i. e., had been 'volunteered' as the phrase went,—the witness had himself only to blame if he was not prepared to support every statement thus volunteered; in short, that all *asser-*

tions made on the direct-examination could be contradicted and shown erroneous, and that the same freedom applied to assertions *volunteered on the cross-examination;* upon which, it was thought, there could not be any unfair surprise. This form of the rule still crops up occasionally.

But this form of rule ignores the other co-operating reason for the rule, i. e., Confusion of issues. Even if one conceded that this form sufficiently obviates the reason of Unfair Surprise, the other reason would still remain, and would be equally fatal, even when the assertion on the collateral matter was made on the direct-examination. The following passage satisfactorily disposes of the error in question.

1859, R. W. Walker, J., in Blakey's Heirs v. Blakey's Executrix, 33 Ala. 619: 'In Dozier v. Joyce it seems to have been considered that the main reason for the rule which prevents a cross-examination upon immaterial matters for the mere purpose of contradicting the witness, is that he cannot be presumed to come prepared to defend himself on such collateral questions; and, as this reason fails when the testimony is voluntarily given, the rule itself does not in that case apply. The reason referred to is doubtless one of those on which the rule was founded, but it is not the only or even the chief one. The principal reasons of this rule are, undoubtedly, that but for its enforcement the issues in a cause would be multiplied indefinitely, the real merits of the controversy would be lost sight of in the mass of testimony to immaterial points, the minds of jurors would thus be perplexed and confused, and their attention wearied and distracted, the costs of litigation would be enormously increased, and judicial inves-

tigations would become almost interminable. An additional reason is found in the fact that, the evidence not being to points material in the case, witnesses guilty of false swearing could not be punished for perjury. These reasons apply equally whether the evidence on such collateral matters is brought out on the examination in chief or upon cross-examination, and whether the witness gives it voluntarily or in response to questions calling for it."

It is then submitted that the respondent having given to the committee voluntarily all the information within his knowledge and contemplated under the asserted authority of the Senate, should not be exposed on mere surmise or suspicion to a cross-examination for the purpose of testing his credibility. The presumption should be indulged that the Senate's witness in its own investigation is telling the truth, when in discharge of his duty as a citizen he gives all information essential to or within the scope of the legislative inquiry, and there is no known fact which impeaches the truth of his testimony which inherently is not improbable or untrue.

Fairness to the respondent requires that answer here should be made to the unjust and false inuendo contained in the following excerpt from petitioner's brief pg. 16:

> "He had been clerk of a State court for twenty-one years, and at the time of his examination was receiving a salary of only $8,000 per year, and yet he testifed that he contributed $50,000 in cash toward the expenses of a Senatorial campaign."

It should be recalled that the respondent testified not only that it was his money, but that he had not collected one dollar or received any money from any individual or source whatever, (pg. 74 Tr. of Record).

This Court is respectfully asked to take judicial notice of ~~that~~ fact that in the investigation now being conducted by the Senate of the State of Pennsylvania, Vice-President Myers of the Mitten Management of the Philadelphia Rapid Transit Company testified that *on January 22nd, 1926,* the Cunningham Cab Company, owned and operated for years by "Sheriff Thomas W. Cunningham and his son" was purchased by the Philadelphia Rapid Transit Company for the sum of $150,000.00, that "Sheriff Cunningham" received net approximately $100,000.00 and that the first payment was made on *January 22nd, 1926.* (Phila. Bulletin March 30-31, 1931.)

In the large, it is not suggested that the Senate must be bound by the testimony of a witness called before its committee nor that it is precluded from asking any question that may be pertinent or relevant to the legislative or judicial inquiry; but it is submitted that no question may be asked by the Senate or its committee in exercise of a legislative function as to which the Constitution prevents legislation.

It is finally submitted that questions even when pertinent and asked by either the Senate or its committee in exercise of either a judicial or legislative function as to which it may legislate will not be permitted, if and when unnecessarily they impinge upon the personal affairs of the witness.

In Sinclair vs. United States, supra, Mr. Justice Butler reviews the cases which emphasize the care with which this Court will safeguard the individual against unreasonable inquiries into his personal affairs. He says on page 292 referring to McGrain vs. Daugherty, 273 U. S. 135:

> "That case shows that, while the power of inquiry is an essential and appropriate auxiliary to the legislative function, it must be exerted with due regard for

the rights of witnesses, and that a witness rightfully may refuse to answer where the bounds of the power are exceeded or where the questions are not pertinent to the matter under inquiry.

It has always been recognized in this country and it is well to remember, that few, if any, of the rights of people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs. In order to illustrate the purpose of the courts well to uphold the right of privacy, we quote from some of their decisions.

In Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377, this court, speaking through Mr. Justice Miller, said (p. 190) 'We are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen'. And referring to the failure of the authorizing resolution there under consideration to state the purpose of the inquiry (p. 195): 'Was it to be simply a fruitless investigation into the personal affairs of individuals? If so, the House of Representatives had no power or authority in the matter more than any other equal number of gentlemen interested for the government of their country. By "fruitless", we mean that it could result in no valid legislation on the subject to which the inquiry referred.'

In re Pacific R. Commission (Circuit Court, N. D. California) 12 Sawy. 559, 32 Fed. 241, Mr. Justice Field, announcing the opinion of the court, said (p. 250): 'Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than

the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value.' And the learned Justice, referring to Kilbourn v. Thompson, supra, said (p. 253): 'This case will stand for all time as a bulwark against the invasion of the right of the citizen to protection in his private affairs against the unlimited scrutiny of investigation by a congressional committee.' And see concurring opinion of Circuit Judge Sawyer, p. 259 at p. 263, and of District Judge Sabin, p. 268, at p. 269.

In Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125, Mr. Justice Harlan, speaking for the court, said (p. 478) 'We do not overlook these constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen. * * * We said in Boyd v. United States, 116 U. S. 616, 630, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, and it cannot be too often repeated, that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of his life.'

Harriman vs. Interstate Commerce Commission, 211 U. S. 407, 53 L. ed. 253, 29 Sup. Ct. Rep. 115, illustrates the unwillingness of this court to construe an act of Congress to authorize any examination of witnesses in respect of their personal affairs * * *

In Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 68 L. ed. 969, 32 A. L. R. 786, 44 Sup. Ct. Rep. 336, this court said (pp. 305, 306): 'Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (Interstate Commerce Commission vs. Brimson) * * *, and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. * * * It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up.'"

SUMMARY.

Respondent denies petitioner's contention that the indictment is conclusive of probable cause, and that the trial court has exclusive jurisdiction to determine the existence of a crime. He submits that the indictment when offered in evidence as proof of probable cause may be attacked, if its counts do not charge a crime; and this because the existence of a crime is the most essential element in the determination of probable cause.

The burden is upon petitioner to show that the questions propounded pertained to some matter under investigation by the Senate committee; and the determination of the question of pertinency is one of law for the court of asylum and not of fact for the trial court.

The entire evidence of probable cause or its lack consists alone of the indictment and the transcript of the notes of testimony; and consequently, all and every fact relative

to the offense charged in the indictment are therein set forth, are in evidence in this case and are free from doubt or dispute.

It is clear that the respondent voluntarily gave to the committee all information that it was possible for him to give within the scope of its inquiry or that could aid it in any manner in the performance of its duties; that the questions were asked by the committee in exercise of a legislative in contradistinction to a judicial function; that the subject-matter of the questions related to the primaries in contradistinction to elections and as to which, under the Newberry case, there could be no valid legislation; that the questions were not "pertinent" within Section 102 of the Revised Statutes and cannot be made so in order to test credibility; and finally, that it is crystal clear the questions related to personal affairs of the most delicate nature, and properly regarded by all men as sacred.

In conclusion, it is submitted that the pivotal inquiry in this proceeding then is, whether the questions propounded are pertinent; and it is suggested that this is so free from doubt as to permit the remanding court to conclude, as stated by the Circuit Court of Appeals, that "the indictment's prima facie evidence of probable cause is overcome by its own terms in failing to charge a crime." The Circuit Court of Appeals should be affirmed in its entry of the order in this habeas corpus proceeding discharging respondent.

All of which is respectfully submitted.

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APPENDIX "A".

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 3857. October Term, 1928.

UNITED STATES OF AMERICA EX REL.
THOMAS W. CUNNINGHAM,
Appellant,

v.

W. FRANK MATHUES, United States Marshal,
Appellee.

Appeal

~~Aapepal~~ from the District Court of the United States for the Eastern District of Pennsylvania.

(Filed June 13, 1930.)

Before BUFFINGTON, WOOLLEY and DAVIS, *Circuit Judges.*

BUFFINGTON, *J.*

After the opinion of this Court was filed, the case of Barry v. Cunningham, 279 U. S. 597, was decided. Thereupon the Government, conceiving that our decision was at variance with the holdings of the Supreme Court in that case, moved a rehearing be had. The motion was granted and such rehearing was given. On due consideration the members of the Court adhere to their views already ex-

pressed in the opinion and the dissent heretofore filed. We therefore confine the present opinion to a brief statement of why we do not regard the Barry case as ruling the present one. The indictment in the present case in the Federal Court for the District of Columbia concerns solely what had already taken place before a Committee of the Senate. When Cunningham refused to answer the questions propounded by that Committee, his crime of contempt, if such it be, was complete and for that completed crime he was indicted. As his entire acts were set forth in the indictment, the Court, on the application for removal, was required to determine whether probable cause was shown. On that question we held the lack of probable cause was shown in that the inquiry made of Cunningham was not pertinent because no power had been conferred by the Senate on this Committee to make such inquiry.

On the other hand, the case of Barry v. Cunningham, *supra,* as held by the Supreme Court, concerned what took place afterwards, namely the action of the Senate in attaching Cunningham and bringing him before it "then and there or elsewhere as it may direct, to answer such questions pertinent to the matter under inquiry as the Senate, through its said Committee, or the President of the Senate, may propound," etc. It will thus be seen that so far as questions to Cunningham are concerned the indictment in the present case concerned questions already asked and refused to be answered, while the Barry case concerned questions to be asked in the future. In deciding the case before it, the Supreme Court explicitly stated what it did and what it did not decide, namely,

> "We must accept this unequivocal language as expressing the purpose of the Senate to elicit testimony in response to questions to be propounded at the bar of the Senate, and the question whether the information sought to be elicited from Cunningham by the

committee was pertinent to the inquiry which the committee had been directed to make may be put aside as immaterial.

"It results that the following are the sole questions here for determination: (1) whether the Senate was engaged in an inquiry which it had constitutional power to make; (2) if so, whether that body had power to bring Cunningham to its bar as a witness by means of a warrant of arrest; and (3) whether as a necessary prerequisite to the issue of such warrant of arrest a subpoena should first have been served and disobeyed."

This question of the pertinency of those questions, which the Supreme Court thus stated it did not pass upon, is the very question which we did then pass upon and which we are now constrained to pass upon in the present case. Adhering, as we have said, to the respective views heretofore held on that question, we adhere to our previous opinion and in doing so, we do not, in our view, disregard the holdings of the Supreme Court.

A true Copy:

Teste:

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Clerk of the United States Circuit Court of Appeals for the Third Circuit.